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DEC 31

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

Nos. 471 and 472.

UNITED STATES OF AMERICA, RECONSTRUCTION FINANCE CORPORATION, et al.,

Petitioners,

against

BANKERS TRUST COMPANY and WILLIAM H. BIXBY, Trustees,

Respondents.

BRIEF FOR RESPONDENTS

JAMES H. MCINTOSH,
CLIFTON P. WILLIAMSON,
EDWARD W. BOURNE,
THOMAS W. WHITE,
Attorneys for Respondents.

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UNITED STATES OF AMERICA, RECONSTRUCTION FINANCE CORPORATION, et al., *Petitioners,* against BANKERS TRUST COMPANY and WILLIAM H. BIXBY, Trustees, *Respondents.*	Nos. 471 and 472.

BRIEF FOR RESPONDENTS

The Opinion Below.

The opinion of the District Court (R. 109) is reported in 7 F. Supp. 1.

Jurisdiction.

The decree of the District Court was signed and entered July 6, 1934 (R. 131). Separate appeals to the United States Circuit Court of Appeals for the Eighth Circuit were allowed by the District Court on July 28, 1934, and by the Circuit Court of Appeals on July 30, 1934 (R. 137 and 254). The case is here on Writs of Certiorari issued pursuant to Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

The sole question in the case is the constitutionality of Joint Resolution No. 10 of the 1st Session of the 73rd Congress, passed June 5, 1933, by which Congress undertook to interfere with and impair the obligations of gold clause con-

tracts (48 Stat. 112). The Respondents are Trustees of a Mortgage securing bonds payable in gold coin of the United States of the standard of weight and fineness of May 1, 1903.

The Way the Case Comes into This Court.

The Respondents are the Trustees under a Mortgage dated May 1, 1903, made by St. Louis, Iron Mountain & Southern Railway Company for the purpose of securing the payment of an issue of bonds maturing May 1, 1933. The Mortgage covered lines of railroad, equipment, and other property of the mortgagor (R. 54-56). In 1917 Missouri Pacific Railroad Company, Debtor in this proceeding, acquired the mortgaged property, but took it subject to the Mortgage (R. 56-57).

The debt secured by the Respondents' Mortgage became due May 1, 1933 (R. 151, 156-158, 186) and is in default of payment (R. 148). March 31, 1933, Missouri Pacific Railroad Company filed its petition in the office of the Clerk of the District Court of the United States, Eastern Division, Eastern Judicial District of Missouri, pursuant to Section 77 of the Bankruptcy Act, alleging that it was unable to meet its debts as they matured (R. 3). Thereupon the District Court on that day entered an order approving said petition and taking over the Railroad Company's property (R. 5), including the property subject to the Respondents' Mortgage.

December 27, 1933, the Respondents filed in said proceeding a petition for leave to intervene in order to have the income of the property subject to their Mortgage applied against the Mortgage debt (R. 52-60). In their petition, they set forth the principal of the mortgage debt and alleged that the debt was payable (R. 54) "in gold coin of the United States of the standard of weight and fineness prevailing on May 1, 1903."

April 5, 1934, the Court made an order giving the Respondents (R. 70) leave to intervene specially to protect and fully conserve their rights, and authorizing the filing of answers to their petition.

Meantime, and on January 25, 1934, Reconstruction Finance Corporation and United States of America, as creditors of the Debtor, filed their joint petition for leave to intervene, in which they traversed some allegations of the Respondents' petition of intervention and denied the validity of the gold clause contained in the Respondents' Mortgage and in the bonds it secures (R. 60-68).

April 5, 1934, the Court made orders giving leave to Reconstruction Finance Corporation and United States of America to intervene specially (R. 69, 71).

April 9, 1934, Reconstruction Finance Corporation filed an answer putting in issue the validity of the gold clause (R. 72-77). April 28, 1934, United States of America filed a similar answer (R. 91-97). The Debtor's Trustees had already filed a like answer (R. 77-81).

The answers of Reconstruction Finance Corporation, United States of America, and the Debtor's Trustees all prayed that there be a prompt decision of the issue of the validity of the gold clause (R. 76, 96, 80).

May 21, 1934 (R. 98-100), Guaranty Trust Company of New York and Benjamin F. Edwards, as Trustees under the First and Refunding Mortgage of the Debtor, answered the allegations of Respondents' petition of intervention, not denying the validity of the gold clause, but asking that a decision (R. 99) "be reserved without prejudice to the rights of any party."

As the Reconstruction Finance Corporation, United States of America, and the Trustees of the Debtor had all asked that the Court determine "without delay" that the gold clause was null and void, and that the Mortgage debt could be satisfied by the payment of the nominal amount

in current dollars, the Court directed a hearing on May 11, 1934, of the issue of law presented (R. 97) which was adjourned to May 25, 1934 (R. 97).

On the hearing, May 25th, the Respondents put in evidence without objection a copy of the Mortgage and a specimen of the outstanding bonds which the Mortgage secured, and it was stipulated that the bonds had not been paid (R. 148).

The hearing was had under Equity Rule 29 (R. 102, 109) upon the motion of the Reconstruction Finance Corporation, the United States of America, and the Debtor's Trustees to "construe" the gold clause and to declare it null and void (R. 102, 109).

June 20, 1934, the Court filed an opinion sustaining the constitutionality of the Joint Resolution of June 5, 1933 (R. 109) and declaring the gold clause void. A decree accordingly was entered July 6, 1934 (R. 131).

The Respondents took two appeals to the United States Circuit Court of Appeals for the Eighth Circuit, one appeal allowed by the District Judge July 28, 1934 (R. 137-138); the other allowed July 30, 1934, by the United States Circuit Court of Appeals for the Eighth Circuit (R. 254). There were thus two cases docketed in the United States Circuit Court of Appeals, No. 10071 and No. 10116, but only one record was printed containing the appeal papers on both appeals.

Before argument of either appeal, all the parties, except the Respondents, filed here a petition for Writs of Certiorari. The Respondents formally in this Court "joined the petitioners in requesting the allowance of a Writ of Certiorari as prayed in their said petition."

The case, therefore, as it stands here, is the appeal of the Respondents from a decree of the District Court against them which has not otherwise been heard or decided.

Statement of the Case.

I.

Brief Statement of the Issue.

This is a dispute between private persons about private written bond and mortgage contracts.

In 1903, the St. Louis, Iron Mountain & Southern Railway Company made and sold an issue of mortgage bonds, in each one of which it promised to pay at the end of thirty years a sum to be measured in a specified way. In 1917 the Debtor bought the mortgaged property subject to the Mortgage, the terms of which were a matter of record. The bonds and mortgage matured on May 1, 1933. They were not paid.

June 5, 1933, Congress passed a Joint Resolution which undertook to change the terms of the bonds and mortgage by voiding provisions contained therein. January 31, 1934, the President issued a Proclamation pursuant to the Agricultural Adjustment Act and the Gold Reserve Act of 1934, and the combined effect of the Resolution, the Acts and the Proclamation was that, if they were valid as applied to these contracts, the amount of the lien of the Respondents' Mortgage measured in the money now current was thereby substantially reduced.

The issue here then is,—Where parties have made contracts with each other for borrowing money, and have by mutual agreement adopted a lawful measure of amount to be repaid, has Congress constitutional power to change the terms of the contracts, and to provide that the debt and the lien securing the debt may be discharged by paying a substantially less sum than the borrower agreed to pay?

II.

The reasons why the Railway Company early in 1903 wanted to borrow money.

Early in 1903 the St. Louis, Iron Mountain & Southern Railway Company owned main railroad lines and branches of the aggregate length of about 1,428.65 miles (R. 151). In addition thereto, it had acquired the lines and property of the White River Railway Company and of the St. Louis Valley Railway Company, constructed and authorized to be constructed, and of the Memphis, Helena and Louisiana Railroad Company (R. 151-153). The Company needed money to improve its existing lines, to complete and equip the property of the several companies it had acquired, and to construct and acquire other lines connecting parts of the railroad which it already owned or had acquired (R. 154-155). Hence its directors and stockholders (R. 155) "duly authorized the creation and issue of Four per cent. bonds to be known as St. Louis, Iron Mountain and Southern Railway Company River and Gulf Divisions First Mortgage Four Per Cent. Thirty-Year Gold Bonds, * * * both principal and interest being payable in the City of New York in gold coin of the United States of the present standard of weight and fineness."

The issue was limited to $50,000,000, and was to be secured by a mortgage or deed of trust constituting a first lien on the property described in and conveyed by said mortgage or deed of trust, and by all other property of every kind and description constructed or acquired by the Railway Company by the use of said bonds (R. 156).

Bonds of the principal amount of $34,548,000 were duly issued on or after May 1, 1903, and were outstanding in the hands of the public when they became due May 1, 1933 (R. 54, 149). Each was payable in "gold coin of the United States of the present standard of weight and fineness" (R. 54, 156-161, 235-236).

III.

Why the Bonds and Mortgage were made payable in "gold coin of the United States of the present standard of weight and fineness."

The bonds were to be Thirty-year Bonds. The currency of the country had been depreciated in the past, and there was apprehension at the time that it might be depreciated in the future.

In 1862 Congress passed the first Legal Tender Act, which was the first statute under which Greenbacks were issued and were made legal tender in payment of private debts. "During 1862 the fluctuations in the quotations of gold in paper currency ranged between 102 and 132; in 1863 between 125 and 160; and in 1864 between 155 and 285" (Dewey's Financial History of the United States, p. 295). After the close of the Civil War the disparity between gold and paper currency diminished gradually (*id.* 376). The process was expedited by the passage of the Resumption Act of 1875, which provided for the resumption of specie payments on January 1, 1879 (*id.* 372-373); but it was December, 1878, before paper currency was quoted at par (*id.* 375). Thus the country had an experience of depreciated paper money lasting for over sixteen years.

Other reasons existed for concern as to the future of the currency.

The Greenback Party had a vigorous prominence for a time, polling more than 1,000,000 votes in the Congressional election of 1878 (*id.* 378).

In 1877 a bill providing for the free and unlimited coinage of silver passed in the House of Representatives by a large majority. It was modified in the Senate. The resultant Bland-Allison Act restored the legal tender character of the silver dollar, and required the Secretary of the Treasury to purchase silver bullion at the market price, not less than $2,000,000 nor more than $4,000,000 per month, and to coin it into dollars (*id.* 405-407).

The Greenback movement waned, but the demands of those interested in silver persisted. The Sherman Silver Act of 1890 increased the amount of silver bullion to be purchased each month and made other provisions designed to strengthen the monetary position of silver (*id.* 436-438).

In 1893, after the British Government suspended the free coinage of silver in India, and when the gold reserve of the United States Treasury was threatened by the compulsory purchase of silver, the statutory provisions requiring the purchase and coinage of silver were repealed (*id.* 444-447).

Then came the Bryan Presidential campaign in 1896, in which the sole issue was the free and unlimited coinage of silver at the ratio of sixteen ounces of silver to one ounce of gold. The fact that 50,000 votes properly placed would have elected Bryan and committed the country to the free and unlimited coinage of silver at the ratio of 16 to 1, shows how serious was the threat, how imminent the prospect, of the depreciation of the currency. In the Presidential compaign of 1900 the free coinage of silver at the ratio of 16 to 1 was still an important issue.

It was only three years later, in 1903, that the Respondents' Mortgage was executed and bonds issued thereunder. The free silver agitation was then on the decline but the memory of it was vital. Nor had the public forgotten that less than thirty years before depreciated paper money was current. Hence, in 1903, the public was not prepared to invest in thirty-year securities and meantime to assume the risk of a depreciation of the currency.

The Railway Company knew the state of the public mind. It knew that it could not sell these long term bonds unless it protected the bondholders from all the risk of a future depreciation of the currency. It knew also that if it protected the bondholders from any risk of a future depreciation of the currency, it not only could sell its bonds, but it could sell them to draw a low rate of interest, four per cent. Hence, for the purpose of guaranteeing that the purchasers of the bonds would get back exactly the same value they

paid for them, the Railway Company made the bonds payable, not in money, merely, not in dollars, merely, but for each bond issued it agreed to pay the bondholder on May 1, 1933, "One thousand dollars gold coin of the United States of the present standard of weight and fineness" (R. 157, 159).

The words themselves show that the Railway Company intentionally undertook to protect the holders of the bonds against any possible depreciation of the currency,—not only against the free and unlimited coinage of silver, or the further issue of irredeemable paper money, but against the possible reduction of the gold content of the dollar. The holders of the bonds were assured that the payment to be made to them in 1933 would be measured by the most stable known measure of value, the value of gold.

In adopting this standard or measure of value the Railway Company used, and the bondholders accepted, the standard which Congress had fixed only three years before in the Gold Standard Act which provided (C. 41, § 1, 31 Stat. 45; U. S. Code Annotated, Title 31, Section 314):

> "Sec. 314. *Standard unit of value.* The dollar consisting of twenty-five and eight-tenths grains of gold nine-tenths fine shall be the standard unit of value, and all forms of money issued or coined by the United States shall be maintained at a parity of value with this standard, and it shall be the duty of the Secretary of the Treasury to maintain such parity."

And in agreeing to pay the bondholders "in gold coin of the present standard of weight and fineness" these parties not merely adopted the standard the Government had fixed, but they adopted substantially the phraseology of the Gold Standard Act of 1900 which had authorized the issuance of Government bonds "payable, principal and interest, in gold coin of the present standard of value" (C. 41, § 2, 31 Stat. 45; U. S. Code Annotated, Title 31, Section 408).

Each dollar the purchasers of these bonds gave the Railway Company for them was, or was the equivalent of, a dol-

lar in gold coin of the United States of the standard of weight and fineness on May 1, 1903. The Railway Company agreed to pay back when due exactly what it got or the equivalent.

IV.

The gold clause, authorized by the stockholders and directors and successfully held out as an inducement to the public to buy the bonds, is especially emphasized both in the Bonds and in the Mortgage.

In the resolution authorizing and directing the issue, the directors and stockholders required that the bonds should be (R. 155) "known as the St. Louis, Iron Mountain and Southern Railway Company River and Gulf Division First Mortgage Four Per Cent. Thirty Year Gold Bonds" (R. 155).

A not very good photostatic copy of one of the bonds is bound in the record after page 234. The Court will notice how the words "Gold Bond" stand out both on the face and on the back of the bond.

Each bond contained the gold clause (R. 157, 159). Each coupon promised to pay in gold coin (R. 161).

The Mortgage mentions the gold feature of the bonds ten times,—once in the title (R. 151), once in the preamble reciting the resolutions of the stockholders and directors (R. 155), six times in setting forth the provisions of the coupon and registered bonds (R. 156-161), once in setting forth the provisions of the coupons (R. 161), once in the provisions relating to temporary bonds (R. 171), and once in the Railway Company's covenant of payment (R. 186). This covenant, which is in Article Third of the Mortgage (R. 186), reads (italics ours):

> "The Railway Company covenants and agrees that it will duly and punctually pay or cause to be paid the principal and interest of every bond issued hereunder and secured hereby all in gold coin of the United States of America of *or equal to* the present standard of weight and fineness * * *."

Could the gold payment feature have been more effectively stressed than it was here?

V.

The Missouri Pacific Railway Company acquired the property subject to the Respondents' Mortgage, and has no interest therein except subject to the Mortgage. The Mortgage Debt has not been paid, and the Mortgage remains a valid Lien on the mortgaged property for the sum agreed to be paid.

In 1917 the Debtor acquired the property of the St. Louis, Iron Mountain & Southern Railway Company (R. 56-57). It took the property subject to the Mortgage. By taking it subject to the Mortgage, the Debtor thereby assented to the measure of the debt which the St. Louis, Iron Mountain & Southern Railway Company had agreed to. But it is now here claiming that that debt is not what the bonds and the Mortgage plainly say it is, because Congress has changed the contract.

The bonds became due on May 1, 1933, but they have not been paid. If the bonds had been paid when due the questions now presented would not have arisen.

VI.

By the Joint Resolution of June 5, 1933, and the Gold Reserve Act of 1934 and the President's Proclamation issued pursuant thereto, Congress has attempted to reduce the amount of the Respondents' valid Mortgage lien.

June 5, 1933, Congress passed and the President approved a joint Resolution as follows (C. 48, 48 Stat. 112):

> "To assure uniform value to the coins and currencies of the United States.
>
> "Whereas the holding of or dealing in gold affect the public interest, and are therefore subject to proper regulation and restriction; and
>
> "Whereas the existing emergency has disclosed that provisions of obligations which purport to give

the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby, obstruct the power of the Congress to regulate the value of the money of the United States, and are inconsistent with the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts. Now, therefore, be it

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. Any such provision contained in any law authorizing obligations to be issued by or under authority of the United States, is hereby repealed, but the repeal of any such provision shall not invalidate any other provision or authority contained in such law.

"(b) As used in this resolution, the term 'obligation' means an obligation (including every obligation of and to the United States, excepting currency) payable in money of the United States; and the term 'coin or currency' means coin or currency of the United States, including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations.

"SEC. 2. The last sentence of paragraph (1) of subsection (b) of section 43 of the Act entitled 'An

act to relieve the existing national economic emergency by increasing agricultural purchasing power, to raise revenue for extraordinary expenses incurred by reason of such emergency, to provide emergency relief with respect to agricultural indebtedness, to provide for the orderly liquidation of joint-stock land banks, and for other purposes,' approved May 12, 1933, is amended to read as follows:

"All coins and currencies of the United States (including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations) heretofore or hereafter coined or issued, shall be legal tender for all debts, public and private, public charges, taxes, duties, and dues, except that gold coins, when below the standard weight and limit of tolerance provided by law for the single piece, shall be legal tender only at valuation in proportion to their actual weight.

"Approved, June 5, 1933, 4:40 p. m."

January 31, 1934, pursuant to Section 43 of the Agricultural Adjustment Act (C. 25, 48 Stat. 51-53) and Section 12 of the Gold Reserve Act of 1934 (C. 6, 48 Stat. 342), the President issued, approved and that day made effective a proclamation (Appendix to Petitioners' Brief, pp. 144-148) establishing a new gold dollar of 15 5/21 grains nine-tenths fine in place of the standard gold dollar of 25.8 grains nine-tenths fine which was the standard dollar at the time this mortgage was made, May 1, 1903.

The Decree Appealed From.

The Court below held that the Joint Resolution was constitutional and that the mortgage debt could be satisfied at any time by payment of any legal tender "dollar for dollar" (R. 131-134).

This means that for each of the old gold dollars of 25.8 grains which the Railway Company promised to pay it need now only pay a new dollar of 15 5/21 grains. And if still

another dollar is established, the Railway Company can use it "dollar for dollar" to pay the mortgage debt, whatever its gold value may be, or even if it has no value at all.

Specification of Errors Relied Upon.

The Respondents, for a reversal of the decree, rely upon the following several assignments of error (R. 135, 252):

1. The Court erred in making its Finding No. (3).

2. The Court erred in making its Finding No. (4).

3. The Court erred in making its Finding No. (5).

4. The Court erred in making its Finding No. (6).

5. The Court erred in making its Finding No. (7).

6. The Court erred in making its Finding No. (8).

7. The Court erred in failing to hold that the so-called "gold clauses" in the Mortgage and Bonds referred to in said decree were intended to and do entitle the obligees to gold coin of the United States of the standard of weight and fineness on May 1, 1903, or to the equivalent thereof if such equivalent could be determined.

8. The Court erred in failing to hold that the equivalent of $1,000 in gold coin of the United States of the standard of weight and fineness of May 1, 1903, could be determined, and was at the time of said decree and still is the number of dollars then and now current obtained by multiplying 1,000 by 25.8 and dividing the same by 15 5/21.

9. The Court erred in failing to hold that the lien of the Mortgage and the amount due on the Bonds issued thereunder could not be discharged except by the payment of the amount of such lien or otherwise pursuant to law.

10. The Court erred in holding that Congress had the power under the Constitution of the United States to enact

so much of Public Resolution No. 10, approved June 5, 1933, as purports to provide that every obligation requiring payment in gold or in an amount in money of the United States measured by gold could be discharged upon payment, dollar for dollar, in any coin or currency which at the time of the payment is legal tender for public and private debts.

11. The Court erred in failing to hold that so much of Public Resolution No. 10, approved June 5, 1933, as purports to provide that every obligation requiring payment in gold or in an amount in money of the United States measured by gold could be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts is in contravention of the Constitution of the United States and particularly the Fifth Amendment thereto.

12. The Court erred in holding that the Trustees and the Bondholders are entitled only to payment of $1,000 upon each Bond in the principal amount of $1,000, validly issued and outstanding, in such lawful money of the United States as is legal tender for the payment of debts, with interest thereon, also in such lawful money of the United States; and that such payment would extinguish the total amount of both principal and interest due upon said bonds.

13. The Court erred in holding that any and all amounts payable to the said Mortgage Trustees should be paid to said Trustees in any lawful money of the United States which is legal tender for debts, and that the money so paid should be accepted by said Trustees at the nominal value thereof and in discharge, dollar for dollar, of the face amount of the indebtedness, including interest, to which it may be applied.

14. The Court erred in holding that the claims of the said Trustees and the said Bondholders for payment in gold or its equivalent and for payment in excess of that provided for in said decree should be denied and rejected.

Summary of the Argument.

I.

The gold clause not merely prescribes the kind of money in which the debt is to be paid, but it fixes a measure of the value of the bonds and a means of computing the sum due if the currency should be depreciated before the bonds are paid.

1. The gold clause was intended to protect the bondholders against depreciation.

2. The language of the clause shows that it was intended to provide a standard of value.

3. Gold clauses have been in use in this country since before the Constitution, and the Government used them to finance the Civil War and subsequently in the exercise of its borrowing power.

4. The Court has repeatedly enforced gold clause contracts, and other courts of highest distinction have construed and enforced them as providing a measure of value.

5. The Joint Resolution contains an implied admission that the gold clause prescribes a measure of value.

II.

These contracts were lawful when made, and were made for a proper purpose, in terms which this Court for nearly half a century before the issue of these bonds had recognized as legal and repeatedly approved as binding.

1. The bonds and mortgage were made in the language the Railway Company chose.

2. The gold clause agreement was for a proper purpose, namely, to assure the purchasers of the bonds that they would get back exactly what they had paid for the bonds or its equivalent in current funds.

3. This Court for nearly half a century before the issue of these bonds had recognized agreements of this sort as legal and enforced them as made; reviewing the decisions on this subject.

III.

The *Legal Tender Cases* did not overrule *Bronson* v. *Rodes*, nor weaken its authority on this question, because the *Legal Tender Cases* refer only to contracts payable in money, simply.

IV.

Congress had no constitutional authority by the Joint Resolution of June 5, 1933, to change the terms of contracts which were valid when made.

1. The Joint Resolution involves the power to regulate the value of money, the power to borrow money, and the limitations imposed by the Fifth Amendment. It also involves the sovereign power of the states to borrow money on whatever terms they choose to make.

2. The power to regulate the value of money cannot be construed to override the borrowing power.

3. The power to regulate the value of money cannot be used in direct violation of the Fifth Amendment.

4. The Resolution encroaches upon the sovereign power of the states by changing the money contracts of states and municipalities and impairing their credit.

5. The Resolution is not an emergency measure.

6. Gold clause contracts do not obstruct the power of Congress to regulate the value of money.

7. Gold clause contracts are not inconsistent with the policy of Congress to maintain the equal power of every dollar.

8. Existing gold clause contracts, valid when made, are not, and cannot be declared by Congress to be, against public policy.

9. The Joint Resolution is not within the scope of the power to regulate the value of money.

10. If the Joint Resolution is sustained, it means that no money contracts can be made based upon any fixed standard, even if provided by law, and required to be performed in that standard.

V.

To provide that these bonds can be discharged upon payment of the nominal amount in any kind of dollars, whatever their gold value, is to take the property of one private person and to give it to another private person.

1. The obligation of the bond is to pay the gold value.

2. The due process clause of the Fifth Amendment prohibits the impairment of gold clause contracts.

ARGUMENT

I.

The gold clause not merely prescribed the kind of money in which the debt was to be paid, but it fixed a measure of the value of the bonds and a means of computing the sum due if the currency should be depreciated before the bonds were paid.

1. The gold clause was intended to be a protection against depreciation of the currency. It is only necessary here to state this proposition. No one has questioned it.

The importance of the clause is emphasized by the title and terms of the bonds and Mortgage. Every suggested construction of the clause must be tested to determine whether it is consistent with the dominant purpose of the parties to protect the bondholders against a depreciation of the currency. No construction of the gold clause can be entertained which does not give full effect to that dominant intent.

2. The words of the gold clause clearly show an intent to establish a measure or standard of value of the money to be paid if the particular kind of money specified in the clause should not be in circulation at the time of payment.

The agreement is to pay "gold coin of the United States of the present standard of weight and fineness" (R. 157); that is, the standard obtaining May 1, 1903, which was the standard fixed by the Gold Standard Act of 1900 (see *Ante*, p. 9).

The covenant in the Mortgage is to pay "in gold coin of the United States of *or equal to* the present standard of weight and fineness" (R. 186). These words in the Mortgage tend to emphasize the already clear intent that payment should be made in gold coin of the specified standard or its equivalent.

Gold clauses vary in the words used. The Government's bonds provide for payment "in gold coin of the present standard of value" (see p. 22). Others name the date instead of using the word "present." Some specifically provide for the payment of coin "or the equivalent thereof." None of these variations in phraseology are important. They all have the same meaning and purpose. The clause used in the bonds and Mortgage in this case is perhaps the clause most commonly used.

By promising to pay a specified sum "in gold coin of the present standard of weight and fineness" the obligor undertakes to pay a specified amount of money in coin having a specified bullion content or, if that is not available, to pay the equivalent in current money. The opinion of the lower Court that the agreement constituted a promise to pay in gold "as a mere commodity" (R. 123) was clearly wrong.

Thompson v. *Butler,* 95 U. S. 694.

Also, in one sense, the promise is a promise to pay a particular kind of money. No one questions that the contract can be performed by paying gold coin of the standard of weight and fineness called for, even if there should be other money, also called dollars, worth more than such gold coin. Thus if silver dollars had been at a premium on May 1, 1933, the debt could nevertheless have been paid in gold dollars of the standard of weight and fineness existing on May 1, 1903.

Bronson v. *Rodes,* 7 Wall. 229, 252.

But the gold clause is more than a promise to pay a particular kind of money; it is essential to its purpose that it be more. The words "of the present standard of weight and fineness" cannot be given any reasonable construction except that the parties thereby intended to fix a standard or measure of value, if the debt should not be paid in the exact coin agreed upon.

The words "gold coin of the *present* standard" of weight and fineness show that the parties contemplated that when the time came to pay there might be gold dollars of a new standard of weight and fineness. They must have known that if gold dollars of a new standard were introduced "gold coin of the present standard" would pass from circulation, as there could not be two standard gold dollars at the same time. By the gold clause they intended that in any such contingency the Railway Company could discharge its debt by paying the equivalent in gold value of the May 1, 1903, dollar—and, correlatively, that it must pay the equivalent so long as the equivalent could be measured in terms of current money.

The Petitioners admit at page 115 of their Brief that the parties intended that, if gold coins of a lesser standard of weight and fineness were tendered, they did not have to be accepted unless enough of them were tendered so that the gold value paid was that called for by the contract. In other words, if the new standard gold dollar of 15 5/21 grains had been coined, a tender of 1,000 new standard gold dollars in *coin* would not have paid a bond. The new dollars now circulating are the equivalent of a new coin dollar of 15 5/21 grains, both by statute and in market value. How, then, can 1,000 of the new dollars now circulating pay a debt which they could not satisfy if they were in gold coin of the present so-called standard?

A construction of the gold clause which does not acknowledge the right of the bondholders to the equivalent of the gold coin promised to be paid is not a construction, it is a nullification, of the clause.

3. The gold clause or its equivalent has been in use time out of mind and has been used not merely in money contracts between private persons, but in money contracts of this Government and in foreign countries.

Gold clauses or their equivalent have been in use in this country since before the Constitution. Examination of a

single record book of Mortgages in the Register's Office in New York County, in which mortgages were recorded for the period from December 6, 1784 to December 22, 1787, discloses seven gold clause mortgages (pp. 77, 110, 141, 146, 255, 262, 297). Of these, five contained a promise to pay "in gold or silver at its present value," which would indicate even at that time an accepted form of gold clause. The other two contained detailed specifications of the weight and value of the coin to be paid.

On March 3, 1863, to finance the Civil War, Congress authorized the issuance of bonds payable "in coin" (C. 73, 12 Stat. 709); and on March 3 and June 30, 1864, and March 3, 1865, Congress authorized the issue of further obligations of the same kind (C. 17, 13 Stat. 13; C. 172, 13 Stat. 218; C. 78, 13 Stat. 469). As these issues were made at a time of national crisis, it is perhaps not too much to say that the bond issues of 1863 and 1864 of the class now declared to be "against public policy" contributed substantially to preserve the Union.

In 1903, the draftsmen of the River and Gulf Division bonds had as a model the bonds provided for under the Gold Standard Act of March 14, 1900 (C. 41, § 2, 31 Stat. 45; U. S. Code Annotated, Title 31, Section 408). That Act provided for the sale of Government bonds "to be payable, principal and interest, in gold coin of the present standard of value."

Each of the Liberty Bond Acts providing for the issuance of bonds contained a provision reading (C. 4, 40 Stat. 35; C. 56, 40 Stat. 288; C. 44, 40 Stat. 503; C. 142, 40 Stat. 844; C. 100, 40 Stat. 1309):

> "The principal and interest thereof shall be payable in United States gold coin of the present standard of value."

Thus a second time the successful prosecution of a great war was financed by the use of the gold clause. Shall we never have another national crisis?

But the use of the gold clause has not been confined to this country. The cases of the Serbian Loans and the

Brazilian Loans before the Permanent Court of International Justice, and the *Feist* case before the British House of Lords, which are discussed below, illustrate its use abroad.

Indeed, Article 262 of the Versailles Treaty provides

> "Any monetary obligation due by Germany arising out of the present Treaty and expressed in terms of gold marks shall be payable at the option of the creditors in pounds sterling payable in London; gold dollars of the United States of America payable in New York; gold francs payable in Paris; or gold Lire payable in Rome.
>
> "For the purpose of this Artiele the gold coins mentioned above shall be defined as being of the weight and fineness of gold as enacted by law on January 1, 1914."

The Court will notice that this language of the Treaty of Versailles is identical with the clause involved in this case except that the Treaty uses the date and these bonds use the word "present" to fix the time.

Will it be contended that the great lawyers of all nations assembled in Paris agreed upon an inept clause to protect the Allied and Associated Powers against payment of the reparations in depreciated money?

We instance these uses of the gold clause to show that it has been used, in identically or substantially the form in which it is found in these bonds, by those having the greatest interest in making the words used mean what they were intended to mean, and by those having the greatest ability and experience in the use of words.

4. This Court has repeatedly enforced gold clause contracts according to their true intent; and other courts of the highest distinction have construed and enforced them as a measure of value.

(a) We reserve for the next following point in this brief a full discussion of the decisions of this Court on gold clause contracts. Under the present heading it seems sufficient to remind the Court of *Gregory* v. *Morris,* 96 U. S. 619, decided

March 25, 1878, in which the Court held that the holder of a gold coin contract could recover a judgment in currency in an amount to be measured by the value in current money of the gold coin agreed to be paid.

(b) The Permanent Court of International Justice decided two cases on this subject, one involving Serbian loans which were payable in gold francs, the other involving Brazilian loans which were payable in gold francs.

Case of Serbian Loans was tried and submitted to the Court on May 15th, 16th, 17th, 18th, 22nd, 23rd and 24th. *Case of Brazilian Loans* was tried and submitted on May 25th, 27th, 28th and 29th. Both cases were decided July 12, 1929. Twelve Judges heard the *Case of Serbian Loans* and the decision was rendered by a vote of nine to three. Eleven Judges heard the *Case of Brazilian Loans,* and the decision was rendered by a vote of nine to two.

The opinions are published in full in "Publications de la Cour Permanente de Justice Internationale," Serie A-Nos. 20/21, published by A. W. Sijthoff's Publishing Company. The *Case of Serbian Loans* is at pages 5-89, and the *Case of Brazilian Loans* at pages 91-155. The quotations below are from this publication.

We shall not attempt to summarize all the facts in the two cases, as each case involved a number of different bond issues. But certain salient facts stand out in both cases:

Each case involved bond issues providing for payment "in gold francs"; the additional safeguard "of the present standard of weight and fineness" or "of the present standard of value" was omitted, as one of the dissenting Judges pointed out (p. 128).

Technically, the French francs, the gold value of which the Court found to be the measure or standard of value adopted by the parties, was not a gold unit at all. It was a silver unit. Therefore the Court looked into the statutes

of France providing for gold coins and thereby determined the weight and fineness of the French franc in gold (pp. 33-34).

For a long time, stated by one of the dissenting Judges to have been fourteen years in the case of the Serbian bonds (p. 66), and ten years in the case of the Brazilian bonds (p. 143), the bondholders had accepted interest in the nominal amount of French paper francs.

The effect of the decisions was to require each of the two Governments to pay about five times as many French paper francs, or new French gold francs, as they would have been required to pay if the Court had not held that the gold clause meant a "gold standard of value."

Yet in both cases the Court decided in favor of the French Government, representing the bondholders.

In the *Case of Serbian Loans,* the Court said (p. 32):

> *"Significance of the term 'gold francs'.*—It is urged that the promise to pay gold francs, or what is called the 'gold clause,' is without legal significance. It is said that there was no international gold franc; that the reference was to money and not to gold as merchandise; that the reference must be taken to be to French money; and that the French monetary unit was silver and that there was no 'gold franc' as a monetary unit. Hence it is insisted that, despite the terms of the engagement, the promise must be construed as one to pay in French currency.
>
> "As it is fundamental that the terms of a contract qualifying the promise are not to be rejected as superfluous, and as the definitive use of the word 'gold' cannot be ignored, the question is: What must be deemed to be the significance of that expression? It is conceded that it was the intention of the Parties to guard against the fluctuations of the Serbian dinar, and that, in order to procure the loans, it was necessary to contract for repayment in foreign money. But, in so contracting, the Parties were not content to use simply the word 'franc,' or to contract for payment in French francs, but stipulated for 'gold francs.' *It*

> *is quite unreasonable to suppose that they were intent on providing for the giving in payment of mere gold specie, or gold coins, without reference to a standard of value.* The treatment of the gold clause as indicating a mere modality of payment, without reference to a gold standard of value, would be, not to construe but to destroy it."

After deciding that the parties adopted the gold franc as a standard of value, the Court, answering the argument that the parties had not foreseen the depreciation of the French franc, said (p. 34),—

> "As this standard of value was adopted by the Parties, it is not admissible to assert that the standard should not govern the payments because the depreciation in French currency was not foreseen, or, as it is insisted, could not be foreseen at the time the contracts were made. The question is not what the Parties actually foresaw, or could foresee, but what means they selected for their protection. To safeguard the repayment of the loans, they provided for payment in gold value having reference to a recognized standard, as above stated."

Particularly significant was the Court's answer to the contention that for extended periods "gold specie in francs or a franc at gold parity was not quoted on the money market" (p. 36),—

> "The conclusion at which the Court has thus arrived is not affected by the fact that, for more or less extended periods gold specie in francs or a franc at gold parity was not quoted on the money market, as was the case at the time when the loans were issued; for the value can always be fixed either by comparison with the exchange rates of currency of a country in which gold coin is actually in circulation, or, should this not be possible, by comparison with the price of gold bullion. Once the gold value is fixed, it is its equivalent in money in circulation which constitutes the amount which is payable at Belgrade, Paris, Brussels and Geneva and at the other places

enumerated in the bonds, in the local currency at the sight rate of exchange on Paris."

The acceptance by the bondholders of paper francs was held not to affect the contract (p. 38),—

> "This conduct of the Parties, that is, the acceptance by the bondholders of depreciated paper francs, is invoked upon two distinct grounds. The first is that this method of executing the contract should be deemed to be controlling in determining the intention of the Parties, in accordance with the familiar principle applicable to ambiguous agreements. On this principle it is argued that the Parties did not intend by the loan contracts to provide for payment in gold francs. But the loan contracts are not ambiguous on this point. They are clear and definite. The fact that gold francs were not paid cannot be admitted to show that gold francs were not promised. If the subsequent conduct of the Parties is to be considered, it must be not to ascertain the terms of the loans, but whether the Parties by their conduct have altered or impaired their rights."

The Court then proceeded to establish that there was no estoppel.

Answering the defense of the impossibility of performance, the Court said (p. 40):

> "It is contended that under the operation of the forced currency regime of France, pursuant to the law of August 5th, 1914, payment in gold francs, that is, in specie, became impossible. But if the loan contracts be deemed to refer to the gold franc as a standard of value, payments of the equivalent amount of francs, calculated on that basis, could still be made. Thus, when the Treaty of Versailles became effective, it might be said that 'gold francs,' as stipulated in Article 262, of the weight and fineness as defined by law on January 1st, 1914, were no longer obtainable, and have not since been obtainable as gold coins *in specie*. But it could hardly be said that for this rea-

> son the obligation of the Treaty was discharged in this respect on the ground of impossibility of performance. That is the case of a treaty between States, and this is a case of loan contracts between a State and private persons or lenders. But, viewing the question, not as one of the source or basis of the original obligation, but as one of impossibility of performance, it appears to be quite as impossible to obtain 'gold francs' of the sort stipulated in Article 262 of the Treaty of Versailles as it is to obtain gold francs of the sort deemed to be required by the Serbian loan contracts."

Article 262 of the Versailles Treaty cited in the above quotation is the same Article from that Treaty which is quoted above on page 23.

In the *Case of Brazilian Loans,* the Court disposed of one of the arguments which has been advanced in this case as follows (pp. 115-116):

> "*Significance of the gold clauses.*—One argument against the efficacy of the provision for gold payments is that it is simply a clause of 'style,' or a routine form of expression. This, in substance, would eliminate the word 'gold' from the bonds. The contract of the Parties cannot be treated in such a manner. When the Brazilian Government promised to pay 'gold francs,' the reference to a well-known standard of value cannot be considered as inserted merely for literary effect, or as a routine expression without significance. The Court is called upon to construe the promise, not to ignore it."

Answering the argument of "force majeure" the Court said (p. 120):

> "'Force Majeure'—The economic dislocation caused by the Great War has not, in legal principle, released the Brazilian Government from its obligations. As for gold payments, there is no impossibility because of inability to obtain gold coins, if the promise be regarded as one for the payment of gold value. The equivalent in gold value is obtainable."

Particularly interesting is the opinion of one of the dissenting Judges, DE BUSTAMANTE, for it shows that he probably would have agreed with the majority on the matter of construction if the clause used had contained the words "of the present standard of weight and fineness." He said (p. 128):

> "But while, on the one hand, gold francs might simply be spoken of for the purpose of payment, it would, on the other hand, be possible to take steps and make provision for fixing the meaning and scope of these words and to decide the course to be adopted, if the gold franc vanished from monetary circulation.
>
> "It was possible, for instance, to stipulate, and this is frequently done, that the payments must be effected in gold francs of the same weight and standard as that of the franc in circulation at the time in France, or to take other precautions widely known in the business world and very often adopted where the intention of the Parties is to avoid indirectly the consequences of certain rules established by legal enactments of a local character."

(c) The British House of Lords decided December 15, 1933, the case of *Feist, Appellant and Société Intercommunale Belge d'Electricité, Respondents,* L. R. (1934) A. C. 161.

The *Feist* case involved the construction of a gold clause in bonds issued by the respondent, a Belgian corporation, in which the respondent promised to pay "to the bearer, at the registered office of M. Samuel & Company, Limited * * * in London * * * the sum of £100 in sterling in gold coin of the United Kingdom of or equal to the standard of weight and fineness existing on September 1st, 1928" (pp. 165-166). The interest was payable at the same place in the same gold coin.

The respondents claimed they were entitled to satisfy the principal and interest "secured by the bond by tendering whatever might at the due date of payment be good legal tender for the nominal amount of the bond or coupons as the

case may be" (p. 168); but the Court held that it was obvious that such a claim would not give effect to the language of the bond; and that, if the bond were so payable, *"these words need in this view never have been inserted at all"* (pp. 168-169). The Court briefly stated and overruled the views of the Judges of the lower Courts, and *held that the gold clause was "the means by which the amount of that indebtedness is to be measured and ascertained"* (p. 172). The Court said, all the Judges concurring (pp. 168-169, 173-174, italics ours):

> "The Company claim, and it has so been decided in both Courts below, that they are entitled to satisfy the principal moneys and interest secured by the bond by tendering whatever might at the due date of payment be good legal tender for the nominal amount of the bond or coupon, as the case may be. It is obvious that this decision deprives of all effect the words which occur in clauses 1 and 2 of the bond, viz.: 'in gold coin of the United Kingdom of or equal to the standard of weight and fineness existing on September 1st, 1928.' These words (which merely for convenience I will call the gold clause) need in this view never have been inserted at all. * * *
>
> "We were in the course of the argument referred to certain decisions and judgments in cases which came before the Permanent Court of International Justice sitting at The Hague. I do not, I need hardly say, treat these as in any way binding upon us. Indeed the relevant facts and words under consideration were very different from those which have been under consideration here. I would like, however, to cite one passage as stating happily and succinctly the considerations and principles which have influenced me in arriving at the conclusion which I have reached. It occurs in the judgment dealing with certain Serbian loans stated to be payable both as to principal and interest in gold. It runs thus: 'As it is fundamental that the terms of a contract qualifying the promise are not to be rejected as superfluous, and as

> the definitive use of the word "gold" cannot be ignored, the question is: What must be deemed to be the significance of that expression? It is conceded that it was the intention of the parties to guard against the fluctuations of the Serbian dinar, and that, in order to procure the loans, it was necessary to contract for repayment in foreign money. But, in so contracting, the parties were not content to use simply the word "franc" or to contract for payment in French francs, but stipulated for "gold francs." It is quite unreasonable to suppose that they were intent on providing for the giving in payment of mere gold specie, or gold coins, without reference to a standard of value. *The treatment of the gold clause as indicating a mere modality of payment, without reference to a gold standard of value, would be, not to construe but to destroy it.'"*

And so the Court held that the bonds were payable in pounds according to the gold value of the nominal amount of each respective payment; "and that accordingly every 'pound' comprised in the nominal amount of each such payment must be treated as representing the price in London in sterling (Calculated at the due date of payment) of 123.2744 grains of gold of the standard of fineness specified in the first schedule of the Coinage Act of 1870" (p. 174).

The conclusions reached by the Permanent Court and by the House of Lords represent the accepted view everywhere except in Germany, whose courts profess to see a difference between a "gold coin" clause and a "gold value" clause. In *Comparative and International Aspects of American Gold Clause Abrogation,* XLIV Yale Law Journal, at pp. 56-57, Professor Nussbaum says:

> "The German Reichsgericht, to be sure, has held that if a debtor promises to pay a certain amount in gold coins, no gold value clause is to be implied. Relying upon a strained interpretation of the German Civil Code, this court granted discharge to certain

gold debtors merely on the ground that after the outbreak of the war, gold coins had gone out of circulation. Similarly the Court of King's Bench and the Court of Appeal of England, in deciding *Feist* v. *Société Intercommunale Belge d'Electricité,* refused to recognize the existence of an implied gold value clause.

"But these decisions do not represent the majority view and are unsatisfactory. From a strict contractual point of view, the aim of the gold clause is to secure to the creditor in all events an amount of legal tender equal to the actual market value of the promised gold coins. Otherwise the gold clause would lose its effect in the very contingency in anticipation of which it had been inserted; it would, in fact, be wholly inoperative.

"For this reason, the Supreme Courts of Denmark and Finland, the Greco-Bulgarian Mixed Arbitral Tribunal, the Permanent Court of International Justice, and the English House of Lords (reversing the decisions of the two lower British courts in the *Feist* case) have all held that a gold value clause must be implied. Of particular importance is the decision of the House of Lords, for the phraseology of the gold clause involved in the *Feist* case is exactly the same as that of the customary American one."

The decisions of the Permanent Court and the House of Lords have, of course, no bearing on the constitutional power of Congress to pass the Joint Resolution of June 5, 1933. But as to the proper construction of the contract they are "persuasive, as coming from two great and learned tribunals" (p. 124). They are really more than that, because their reasoning is so transparently honest and undeniably sound that even the Court below said (R. 125),—

"It may well be and arguendo conceded, that when resort is had for guidance to abstract justice and cold logic, the conclusions reached in each of the cases relied on by interveners are impeccable."

5. The Joint Resolution of June 5, 1933, contains an implied admission that the gold clause prescribes a measure of recovery.

Both in the preamble and in Section 1 of the Joint Resolution it is made clear that it is addressed to "any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, *or in an amount in money of the United States measured thereby*" (*ante*, p. 12).

Thus the draftsmen of the Resolution revealed their expectation that this Court would construe the gold clause as it had been construed in *Gregory* v. *Morris*, 96 U. S. 619, and by foreign Courts.

Congress did not undertake to distinguish between gold clauses according to their phraseology. It was not interested in whether a gold clause provided for payment in "gold coin of the present standard of weight and fineness" or "gold coin of the present standard of value," or whether the promise to pay the equivalent was separately and literally expressed or merely a matter of necessary implication. Congress undertook to alter the terms of all gold clause contracts, however phrased, and to attempt to invalidate every promise which "purports to give the obligee a right to require payment in gold * * * or in an amount of money of the United States measured thereby." Congress did not even provide that if the Resolution were partially invalid the remainder should not thereby be affected.

The plain purpose and intent of the gold clause, therefore, was to protect the bondholders against depreciation of the currency and to furnish a measure of the value of the bonds and a means of computing the sum due if the currency should be depreciated before the bonds were paid; and this was intended to be both its meaning and its effect.

II.

These contracts were lawful when made, and were made for a proper purpose, in terms which this Court for nearly half a century before the issue of these bonds had recognized as legal and repeatedly approved as binding.

1. The Railway Company in its own language, not the bondholders, determined upon and fixed all the terms and conditions of these bonds and of the Mortgage given to secure them, and offered them for sale to the public on its own terms. The public bought the bonds on the terms and conditions the Railway Company put in them, and in the Mortgage securing them. In buying the bonds the purchasers paid the Railway Company for them gold coin of the United States of the standard of weight and fineness on May 1, 1903, or its equivalent in value. As was only fair and right, the Railway Company agreed to pay back to the holder of each bond on the date it became due just what the Company had received from him, namely, $1,000 gold coin of the United States of the then standard of weight and fineness, or its equivalent. This being so, can the Debtor Company now do less than the Railway Company agreed to do? The bondholders do not ask it to do more.

2. The agreement to pay gold coin of the United States of the then standard of weight and fineness was for a proper purpose, namely, to assure the purchasers of the bonds that when they became due the bondholders would get back exactly what they had paid for the bonds, or its equivalent in current funds. Agreements of this kind were in common use at the time, and had been for more than a century. The Government put similar terms of payment in the bonds it issued. Nobody, so far as we can find, ever before questioned the propriety of such agreements or doubted their legality.

3. This Court for nearly half a century before the issue of these bonds had recognized agreements of this sort as legal, repeatedly approved them as binding, and rigidly enforced their terms.

Bronson v. *Rodes,* 7 Wall. 229, decided in February, 1869, is the leading case on this subject. It has often been cited as authority for the validity of such contracts and their enforcement. In that case, in 1851 was made a bond, payable "in gold and silver coin, lawful money of the United States." The bond was secured by a mortgage on real estate which Rodes bought, and assumed and agreed to pay the mortgage debt. He offered to pay, in 1865, in current funds "a sum nominally equal to the principal and interest due upon the bond and mortgage." At that time a dollar in coin was equivalent in market value to $2.25 in United States notes. Bronson sued him for the recovery of gold and silver coin, lawful money of the United States, which the bond called for, but the lower Court gave him judgment for only the nominal sum due in United States notes. This Court reversed the lower Court and held Bronson was entitled to be paid according to the terms of his contract. The Court which decided the case was composed of Chief Justice CHASE and Associate Justices NELSON, GRIER, CLIFFORD, SWAYNE, MILLER, DAVIS and FIELD. Mr. Chief Justice CHASE, in delivering the opinion of the Court, said (p. 245),—

> "It is the appropriate function of courts of justice to enforce contracts according to the lawful intent and understanding of the parties";

and after referring to the history of the currency of the Country at the time of making the note the Court continued (p. 246),—

> "The terms of the contract must have been selected, therefore, to fix definitely the contract between the parties and to guard against any possible claim

> that payment, in the ordinary currency, ought to be accepted."

Then, after further historical discussion, the Court said (pp. 250, 254),—

> "A contract to pay a certain number of dollars in gold and silver coin is, therefore, in legal import nothing less than an agreement to deliver a certain weight of standard gold, to be ascertained by a count of coins, each of which is certified to contain a definite portion of that weight. * * *
>
> "It follows that the tender under consideration was not sufficient in law, and that the decree directing satisfaction of the mortgage was erroneous."

All the Judges concurred in the decision, except Mr. Justice MILLER, who disagreed with the Court on the intent of the parties as expressed in the note.

Later, in *Gregory* v. *Morris,* 96 U. S. 619, referred to more fully below, the Court made it clear that it did not consider a gold coin contract simply a bullion contract, but held, in effect, that a gold coin contract was a special form of money contract in which the value of the gold contracted to be paid was to be the measure of the recovery in money.

In March, 1869, the Court decided the case of *Butler* v. *Horwitz,* 7 Wall. 258, involving payment under a lease which called for "annual rent of fifteen pounds current money of Maryland payable in English gold and coins weighing five pennyweight and six grains at thirty-five shillings each, and other gold and silver at their present weights and rates established by Act of Assembly." The Court said that "the obvious intent of the contract was to secure the payment of a certain rent in gold and silver" and thereby to avoid the fluctuations to which the currency of the country had been subject, and also future fluctuations; and citing *Bronson* v. *Rodes* as an authority, the Court held that "the damages should have been assessed at the sum agreed to be due, with interest, in gold and silver coin."

In *Bronson* v. *Kimpton,* 8 Wall. 444, decided November 29, 1869, the following is the entire and unanimous opinion of the Court delivered by Mr. Chief Justice CHASE,—

> "The writ of error in this case brings before us no other questions than those which have been already considered and determined in the case of *Bronson* v. *Rodes* and *Butler* v. *Horwitz.*
>
> "The suit in the state court was brought by Kimpton, to compel satisfaction of a mortgage executed by him to Bronson, on the ground that it had been paid. The mortgage was given to secure a bond for the payment of a certain sum in gold and silver coin, lawful money of the United States. The payment relied on was a tender of United States notes, equal in nominal amount to the sum due on the bond and mortgage. The Supreme Court of New York held the tender sufficient, and adjudged satisfaction; and this judgment was affirmed by the Court of Appeals, and is now here for review.
>
> *"The principles settled in the cases referred to require the reversal of this judgment, and it is accordingly reversed. The case will be remanded for further proceedings."*

In *Dewing* v. *Sears,* 11 Wall. 379, the Court directed the entry of a judgment for "coined dollars and parts of dollars."

After the great battle over the validity of the Legal Tender Act in *Knox* v. *Lee,* 12 Wall. 457, which was finally decided May 1, 1871, the Court, January 22, 1872, decided the case of *Trebilcock* v. *Wilson,* 12 Wall. 687, which involved the payment of a note which was "payable in specie" and was secured by a real estate mortgage. The Court said that (p. 695, italics ours)

> "the terms, 'in specie,' * * * mean that the designated number of dollars in the note shall be paid in so many gold and silver dollars of the coinage of the United States * * *. This being the meaning

> of the term in specie the case is brought directly within the decision of *Bronson* v. *Rodes*, 7 Wall. 229, where it was held that express contracts, payable in gold or silver dollars, could only be satisfied by the payment of coined dollars, *and could not be discharged by notes of the United States declared to be a legal tender in payment of debts.*"

Mr. Justice BRADLEY dissented for the reasons stated in his opinion in the Legal Tender cases, and Mr. Justice MILLER dissented on the ground of his dissent in *Bronson* v. *Rodes*.

Gregory v. *Morris*, 96 U. S. 619, is perhaps the most important of all of the gold clause cases. It involved a lien on cattle payable in gold coin. While it was a replevin action, the recovery was to be measured by the lien in gold coin. The Court said (pp. 624-626, italics ours):

> "Gregory himself asked the court to charge that 'The jury must compute damages and return their verdict in dollars and cents.' This was undoubtedly correct, and it was done; but he further asked the court to say that 'No agreement or contract to pay a certain number of dollars in gold can be enforced. The national currency is by law a legal tender at its face value for all debts and demands, public or private, except duties on imports and interest on the public debt.' This was in conflict with *Bronson* v. *Rodes*, and therefore properly refused.
>
> "But the court did say to the jury, that, if they found the contract on the part of the plaintiff was to pay a certain sum of money in gold, they should compute the difference between gold and currency, and render their verdict in dollars and cents in currency; and in this we see no error. While we have decided that a judgment upon a contract payable in gold *may* be for payment in coined dollars, we have never held that in all cases it *must* be so. While gold coin is in one sense money, it is in another an article of merchandise. Gregory was required to discharge his debt in gold before he could rightfully take

the property into his possession under the replevin. If the payment had been so made, Morris would have had his coin at that time to use as money or merchandise, according to his discretion. But it was not made; and Gregory, by his wrongful act in taking the property, subjected himself to damages. If the contract had been in terms for the delivery of so much gold bullion, there is no doubt but the court might have directed the jury to find the value of the bullion in currency, and bring in a verdict accordingly. But we think, as was thought in *Bronson* v. *Rodes*, such a case is not really distinguishable from this. The question is not whether Gregory had the right to pay in gold dollars after his debt had become due, but whether, having wrongfully got the property into his possession without payment at all, the damages he is required to pay on account of this wrongful act *must*, as a matter of law, be estimated in gold, or whether they *may* be in currency. *We think it clear that, under such circumstances, it was within the power of the court, so far as Gregory was concerned, to treat the contract as one for the delivery of so much gold bullion; and, if Morris was willing to accept a judgment which might be discharged in currency, to have his damages estimated according to the currency value of bullion.* Certainly, if Morris had in good faith sold the cattle under his power of sale for currency, and received payment in that kind of money, he would have been entitled to convert the currency into gold before crediting it upon his debt. *So here, if, with the approbation of the court, he takes a judgment that may be discharged in currency, the judgment should be for an amount which would be the equivalent in currency of the specified amount of coin as bullion.* This was the rule adopted by the court, and we think it correct."

In *United States* v. *Erie Railway Co.*, 106 U. S. 327, and 107 U. S. 1, The Erie Railway Company had failed to deduct the amount of taxes from the interest on bonds held

by alien non-resident holders. The Government sued for the taxes, and this Court first directed judgment for the equivalent in lawful money of the sterling taxes payable. At the time when the taxes were payable, legal tender money was at a discount in terms of gold and sterling but the Court made no allowance for "the currency value of the pound sterling when the taxes fell due" for the reason that no claim had been made therefor. On rehearing the Court said (107 U. S. 2-3):

> "This suit is, therefore, for the debt which the company owes, to wit, five per cent of the pounds sterling it has paid as interest on its bonds. If the debt had been paid at the time it was due, the officers chargeable with the collection could have accepted nothing but legal-tender currency, and to an amount equivalent to the value of the coin which was owing. In other words, the debt was in the nature of an obligation to pay in coin, but which the government would not receive in anything but legal-tender currency of equal value with the coin. This is a suit for the recovery of that debt as a debt. If there were now any difference in value between coin and currency, it would have been proper to render the judgment for the coin or its equivalent in currency. *Gregory* v. *Morris*, 96 U. S. 619."

Other decisions illustrating the action of this Court in gold clause cases,—

> *The Steamship Telegraph* v. *Gordon*, 14 Wall. 258 (1872);
> *The S. S. "Emily B. Souder"* v. *Pritchard*, 17 Wall. 666 (1873);
> *Thompson* v. *Butler*, 95 U. S. 694 (1878).

In every one of the cases involving a promise to pay in gold coin this Court insisted upon the entry of judgment either for gold coin or for its equivalent in currency.

It is perfectly clear, therefore,

1. That these contracts proposed by the Railway Company in language chosen by it, were lawful when made, and were made for a proper purpose in terms which this Court recognized as legal in 1868 in *Bronson* v. *Rodes,* and approved in subsequent cases in which *Bronson* v. *Rodes* was cited as authority for the Court's decisions;

2. That in 1903, when these contracts were made, it was settled that a provision for payment in gold coin did not specify a means of payment merely, but provided a standard of value which should be the measure of recovery; and

3. That the obligee of a gold contract was entitled to a judgment for gold coin or to a judgment for an amount which would be the equivalent in currency of the specific amount of gold agreed to be paid.

III.

The Legal Tender Cases did not overrule *Bronson* v. *Rodes* nor weaken its authority on this question, because those cases referred only to contracts payable in money, simply.

The contracts before the Court in every legal tender case related solely to the payment of money, simply, not to the payment either of specie or of gold coin of the United States of the present standard of weight and fineness, nor to any other form of payment except money, simply; and the Court in every legal tender case laid emphasis upon the fact that the Court's decision related solely to contracts payable in money, simply, and not to contracts payable in dollars of a specified kind or to be measured in a specified way.

In *Knox* v. *Lee*, 12 Wall. 457, (May, 1871) the leading legal tender case, the majority opinion by Mr. Justice STRONG says (p. 549, italics ours):

> "Every contract for the payment of *money, simply,* is necessarily subject to the constitutional power of the Government over the currency, whatever that power may be, and the obligation of the parties is, therefore, assumed with reference to that power."

And the majority of the Court held that damages for the conversion of sheep in March, 1863, were payable, not in gold, but in legal tender notes of the United States. The majority opinion did not refer to *Bronson* v. *Rodes* at all, nor did any of the elaborate and learned dissenting opinions, except that Mr. Justice CLIFFORD in his dissenting opinion said (p. 624):

> "Repeated decisions of this court, of recent date (*Bronson* v. *Rodes,* 7 Wall 248; *Butler* v. *Horwitz,* 7 Wall. 259; *Bank* v. *Supervisors,* 7 Wall. 28), have established the rule that contracts to pay coined dollars can only be satisfied by the payment of such money, which is precisely equivalent to a decision that such notes as those described in the Acts of Congress in question are not the money recognized and established by the Constitution as the standard of value, as the money so recognized and established, if the contract is expressed in dollars, will satisfy any and every contract between party and party."

The latest legal tender case, *Juillard* v. *Greenman,* 110 U. S. 421 (March, 1884), involved the purchase price of an ordinary sale of cotton without any agreement as to the kind of money in which the price should be paid. The buyer tendered the price in United States legal tender notes, but the seller demanded payment in specie. The Court held against the seller on the ground that the sale was for money,

simply, and that, therefore, a tender of the nominal amount of current funds was good. In its opinion by Mr. Justice GRAY, the Court, after elaborately discussing the constitutional authority of Congress, concluded by saying at page 449 (italics ours),—

> "So, under the power to coin money and to regulate its value, Congress may (as it did with regard to gold by the act of June 28th, 1834, ch. 95, and with regard to silver by the act of February 28th, 1878, ch. 20) issue coins of the same denominations as those already current by law, but of less intrinsic value than those, by reason of containing a less weight of the precious metals, and thereby enable debtors to discharge their debts by the payment of coins of the less real value. A contract to pay a certain sum in money, *without any stipulation as to the kind of money in which it shall be paid,* may always be satisfied by payment of that sum in any currency which is lawful money at the place and time at which payment is to be made. 1 Hale P. C. 192-194; Bac. Ab. Tender, B. 2; Pothier, Contract of Sale, No. 416; Pardessus, Droit Commercial, Nos. 204, 205; *Searight* v. *Calbraith,* 4 Dall. 324. As observed by Mr. Justice STRONG, in delivering the opinion of the court in the *Legal Tender* cases, 'Every contract for the payment of money, *simply,* is necessarily subject to the constitutional power of the government over the currency, whatever that power may be, and the obligation of the parties is, therefore, assumed with reference to that power.' 12 Wall. 549."

Moreover, the Court itself which decided the leading *Legal Tender Cases* made it perfectly clear that the legal tender decisions did not apply to contracts payable in gold value; for that same Court, less than a year and at the next term after its decision in *Knox* v. *Lee* expressly held in *Trebilcock* v. *Wilson,* 12 Wall. 687, that a contract payable in specie "could not be discharged by notes of the

United States declared to be a legal tender in the payment of debts."

It is clear, therefore, that the *Legal Tender Cases* have no application to any contract except contracts for the payment of money, simply; that they were not intended to weaken, and did not weaken, the authority of *Bronson* v. *Rodes* on this subject; and that they had no application to contracts payable in "gold coin of the United States of the present standard of weight and fineness."

IV.

Congress had no constitutional authority, by the joint resolution of June 5, 1933, to change the terms of contracts which were valid when made.

Preliminary to a discussion of this Joint Resolution and its validity, we remind the Court *"that a legislative declaration of facts that are material only as to the ground for enacting a rule of law * * * may not be held conclusive by the courts,"*

Block v. *Hirsh,* 256 U. S. 135, 154 (1921).

> "In this country written constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments, and the provisions of Magna Carta were incorporated into Bills of Right. They were limitations upon all the powers of government, legislative as well as executive and judicial. * * * Applied in England only as guards against executive usurpation and tyranny, here they have become also bulwarks against arbitrary legislation;"

Hurtado v. *California,* 110 U. S. 516, 531-532 (1884).

> "It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."
>
> *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 325 (1893).

> "To sustain the individual freedom of action contemplated by the Constitution, is not to strike down the common good but to exalt it; for surely the good of society as a whole cannot be better served than by the preservation against arbitrary restraint of the liberties of its constituent members."
>
> *Adkins* v. *Children's Hospital,* 261 U. S. 525, 561 (1923).

Keeping in mind that the gold clause was agreed upon for the purpose of conserving the real value of the bonds against a possible depreciation of the currency, and of measuring the amount of the debt if the currency should become depreciated before the bonds were paid, let us look at the Joint Resolution.

The Joint Resolution strikes out from all money contracts any provision that the debt should be measured by gold value. Its purpose was to rewrite all such contracts, whether Government obligations, state or municipal bonds, or private debts, and to make them read as if no specific measure of the debt had in fact been agreed to. It undertook to do this, notwithstanding that the measure of value agreed upon was a standard which had been established by the Government itself (*ante,* p. 9). And the Resolution undertook to do this on the theory that Congress was thereby exercising its power to regulate the value of money.

A careful consideration of this Joint Resolution shows that it does not involve the regulation of the value of money;

that its real purpose, intent and direct effect are directly and solely, not indirectly nor incidentally, to change the terms of contracts which were valid when made, in that it requires the creditor to accept in settlement less than the creditor paid for his bonds and less than the debtor agreed to pay back; and that it is not responsive to any constitutional power vested in Congress, but is the arbitrary exercise of legislative authority without any basis in constitutional right.

1. The Joint Resolution directly involves two constitutional grants of power,—(1) the power to "coin money, regulate the value thereof," and (2) the power to "borrow money on the credit of the United States,"—and one limitation of power, namely, the limitation imposed by the Fifth Amendment. It also directly involves an encroachment by the Federal Government on the sovereign power of the states.

2. No one constitutional power can be construed to override another. The power to borrow money is as important as the power to coin money and regulate the value thereof. Hence what Congress has done in the exercise of its power to borrow money it cannot undo in the exercise of its power to coin money and regulate the value thereof. When, therefore, during the war and at other times Congress borrowed money on the credit of the United States and promised to pay it back in dollars "of the present standard of value," it was exercising a power which the Constitution gave it; therefore how could Congress afterwards say the contracts it then made in the exercise of its power to borrow money are now contrary to public policy?

If it were true that such contracts so made under the borrowing power really interfered with the power of Congress to coin money and regulate the value thereof, that the

two powers conflicted and that the coinage power limited the borrowing power, *this would mean that no Congress ever had or could have the power to issue bonds containing a promise to repay the money borrowed in coin or dollars of any agreed standard of value.* If this were true, then the Congress of 1863 and 1864 had no power to finance the last campaigns of the Civil War by issuing bonds payable "in coin" (*ante*, p. 22); the Congress in 1917 and 1918 had no power to finance the World War by issuing bonds payable "in gold coin of the present standard of value" (*ante*, p. 22); and every Congress which has issued bonds since February 4, 1910, has made a promise it had no power to make (C. 25, 36 Stat. 192; Title 31, U. S. C. § 768). And neither the present Congress nor any future Congress can ever issue bonds containing a binding obligation to repay the debt measured by the standard of value which prevailed when the debt was contracted.

Thus the wholly unwarranted scope which the Congress gives to the power to "coin money, regulate the value thereof," would, if it were the true scope of that power, make the borrowing power of Congress, which is at least equally important, an ineffective thing.

3. Similarly, the power to regulate the value of money cannot be used in direct violation of the limitations imposed upon Congress by the Fifth Amendment. If by this Resolution Congress were really exercising the power to regulate the value of money and the legitimate exercise of that power indirectly or incidentally impaired the obligations of gold clause contracts, a different question would be presented. But the Resolution is not and does not purport to be a regulation of the value of money, nor is its effect on these contracts indirect or incidental. On the contrary, its sole purpose and its effect are, not to regulate the value of money, but directly and immediately, not indirectly nor incidentally,

to change these contracts by destroying their most valued obligation. Thus the Resolution not only undertakes to restrict the expressed and vastly important power of Congress to borrow money on the credit of the United States, but it directly violates the limitation of power imposed by the Fifth Amendment.

4. Moreover, by this Resolution the Federal Government directly encroaches upon the sovereign power of the states by interfering with their power to borrow money on whatever terms they choose to make, by changing the terms of the contracts which they have made in borrowing money, by impairing their credit, and by interfering with and hindering their future financing.

In the exercise of their sovereign power states, and municipalities under the authority of the states, have made gold clause contracts in vast sums. They have done this in the exercise of their sovereign power to borrow money for state and municipal purposes on whatever terms they chose to make. The Federal Government has no authority to interfere with them in this exercise of their sovereign power. As this Court said in the *Pollock* case,—

> "* * * under the fundamental law, as to the power to borrow money, neither the United States on the one hand, nor the States on the other, can interfere with that power as possessed by each and an essential element of the sovereignty of each."
>
> *Pollock* v. *Farmers Loan & Trust Co.*, 157 U. S. 429, 585.

The Comptroller of the City of New York advises us that December 31, 1933, the city had outstanding gold clause contracts aggregating $1,632,543,608.48. These contracts were made and were to be performed in the standard of value Congress had fixed and which was in use at the time the con-

tracts were made. Did the city not have a right to make such contracts? May not a state or municipality in its money dealings use the standard of value Congress has fixed both for borrowing money and for paying it back? Or must it use one standard of value for borrowing and another standard for paying back, if another standard prevails when the debt is due? Do the money contracts of states and municipalities depend upon the constitutions and laws of the states, or do they depend upon the will of Congress?

5. This Resolution is not and does not purport to be an emergency measure. The preamble says, the existing emergency has disclosed that contracts which require payment in gold value obstruct the power of Congress to regulate the value of money and are inconsistent with the policy of Congress to maintain the equal power of every dollar. That is, Congress merely says it has found out from the emergency that such contracts have the effect stated in the preamble.

Besides, if this were an emergency measure it would end with the emergency, and then the Railway Company would have to pay these bondholders what it agreed to pay. But it purports to be legislation for all time.

Compare *Block* v. *Hirsch*, 256 U. S. 135;
Home Building & Loan Association v. *Blaisdell*,
290 U. S. 398, 425, 440-441.

6. This Resolution says these gold clause contracts "obstruct the power of Congress to regulate the value of money." Gold clause contracts have been in common use since before the adoption of the Constitution. During all this time Congress has regulated the value of money. It has coined money and regulated the value thereof by stamping the monetary value of the coin, increasing and decreasing the gold, silver

or other metal content of the coin; it has issued paper money, designated its monetary value, provided that it be redeemable or irredeemable, withdrawn it from circulation, and issued new paper money.

It is obvious that the act of regulating the value of money is not obstructed by the existence of gold clause contracts. A medium of exchange can be abandoned and a new medium substituted, irrespective of the existence or amount of outstanding gold clause contracts. The substitution of a new medium may change the number of units payable on the contracts, but that is merely one *effect* of the change in medium, not an obstruction to the change.

The obligation of these bonds was to pay in *dollars* of the existing *gold standard of value*, or their equivalent. Obviously, if Congress undertook to abandon the gold standard dollar existing on May 1, 1903, and to establish a new unit of currency, also called a dollar, but of a less gold value, a different number of new dollars would be payable. But that would not change the obligation of the bonds, which would always be to pay the same gold value. There would be merely a *nominal* increase in the units of currency payable, an increase in the number of the units but not an increase in the value to be paid when measured by the standard agreed upon in the bonds.

This was pointed out by the Permanent Court in the *Case of Brazilian Loans, supra,* at page 117:

> "The devaluation of the French franc could not increase the obligation of the latter (the borrower); the gold clause merely prevents the borrower from availing itself of a possibility of discharge of the debt in depreciated currency."

What then, did Congress mean when it said that the gold clause contracts obstruct the power of Congress to regulate the value of money?

When a currency is devalued, when a new dollar is substituted for an existing standard dollar, the *nominal* value of all property except currency and simple dollar obligations for a fixed amount is affected to a greater or lesser degree. Therefore, an exercise of the power to devalue the dollar can *result* in an impairment of the *real* value of currency and of simple dollar obligations payable in a fixed amount; or, to state the same proposition in other words, an exercise of the power to devalue the dollar can result in an increase in nominal prices and a consequent reduction of the real value of currency and obligations to pay a fixed number of dollars simply.

When Congress authorized the devaluation of the dollar in 1933 its declared purpose was to increase nominal prices, which was the same thing as reducing the real value of currency and of fixed obligations to pay a fixed number of dollars, simply (Agricultural Adjustment Act, Sec. 1, 2, C. 25, 48 Stat. 31-32). The devaluation was expected to increase the nominal prices of wheat, cotton, and other farm products, and, we assume, also of silver, land, and other forms of property. And it was certain to have the automatic effect of increasing the nominal value of gold exactly in proportion to the devaluation.

Congress, proceeding on the theory that a devaluation of the dollar would increase prices correspondingly, saw that the nominal value of gold clause contracts would rise in proportion to the devaluation, thus preserving the real value of those obligations. What Congress wanted to do was to devalue the dollar for the purpose of correspondingly raising prices and reducing the real value of all debts. The gold clause in contracts prevented Congress from reducing the real value of those obligations. The gold clause did not obstruct the power of Congress to devalue the dollar; it merely limited the effect as to contracts which contained the gold clause.

By the Joint Resolution Congress undertook to regulate in advance the nominal effect of an exercise of one of its powers. Congress has no power to regulate the nominal or even the real effects of an exercise of one of its powers, either before or after. It may consider before it exercises a power what the results of its exercise of power may be, but it cannot change the situation before it acts in order to prevent results of its action which it considers undesirable. If it could do this, it could change or regulate everything, including both debts and prices.

7. Nor are gold clause contracts "inconsistent with the declared policy of Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts."

The policy of Congress referred to in this recital in the Resolution is the policy of having every dollar which is authorized by law and is in circulation on a parity with every other dollar that is authorized by law and is in circulation *at the same time.*

Parity in the payment of debts is established by legal tender laws. Parity in the markets is maintained by redemption, convertibility, and acceptance of the circulating money by the Government in payment of duties and imposts. But parity means equality between dollars circulating at the same time.

When Congress passed the Joint Resolution it was not maintaining all dollars coined or issued by the United States at a parity with the standard gold dollar (see Petitioners' Brief, p. 106). Indeed, if it had been doing so and had intended to continue to do so, there was no need for Congress to consider the existence of gold clause contracts, because every circulating dollar, if maintained at a parity with the existing standard gold dollar, would have been equally acceptable and the gold clause would have had no practical effect.

However, Congress planned to establish a *new* gold dollar to take the place of the standard gold dollar established by the Gold Standard Act. It expected all new dollars to be maintained on a parity with the new gold dollar, if and when established (Agricultural Adjustment Act, Sec. 43; C. 25, 48 Stat. 52, 53).

Since the establishment of the new gold dollar Congress has maintained all circulating dollars on a parity with the new gold dollar. Gold clause contracts have not obstructed it in this in any way. All the dollars now circulating have an equal power to pay gold clause contracts. The same number of new dollars is required to pay a gold bond today, no matter what kind of new dollars may be used. A law which provides for paying a bond with a less number of the new dollars than the bond itself requires simply impairs the obligation of the bond.

The policy of maintaining the equal power of every dollar in the markets and in the payment of debts does not mean that the policy of Congress is to control the "purchasing power of the dollar"; the policy involves only the relation of circulating dollars to each other. Whatever the dollar, its purchasing power varies, and must vary. Its purchasing power depends upon trade and business, upon locality, and upon the will of the persons who use it. It will have one power when trade and business are good and another power when trade and business are bad. It will have one power in one locality and a different power in another locality with respect to the same thing. It will have one power in one shop and another power in another shop in the same locality for the same thing. If Congress had authority to regulate the purchasing power of money, it could fix all prices and all wages without limit.

8. Section 1 of the Joint Resolution says that contracts which provide for payment in gold value are declared to be "against public policy."

Why against public policy? They were not against public policy when the Government in the exercise of its borrowing power organized leading men in every community and instructed them to attend meetings and sell its gold clause bonds to raise money to win the war. Will they be against public policy if needed again to meet another such situation?

They were not against public policy when states and municipalities made such contracts in their financing. The states, and municipalities under the authority of the states, have the sovereign right to borrow money and to make any contracts about its repayment their constitutions and laws authorize them to make and that they wish to make. When, in the exercise of this soverign right, they chose to agree to pay back money they borrowed according to the same standard of value as the money they received, that was their sovereign right and privilege and it could not have been against public policy.

Nor was the gold clause in contracts between private persons against public policy. Congress established the standard of value so that people might use the established standard in dealing with each other. Hence to use that standard could not be against public policy. Moreover, such contracts were the very best of policy, because they induced investors to make long-term loans. And long-term loans are indispensable in all great enterprises such as the building, maintaining and equipping of railroads, subways, waterworks, telephone and telegraph systems, and the like.

The making of agreements to pay in gold coin of the standard established by the United States or its equivalent in value could not have been against public policy when these contracts were made; nor was the existence of those contracts against public policy on June 5, 1933, when the Joint Resolution was passed. No change in conditions, no emergency, could make existing contracts, which use the standard of value provided by law as their basis, against public policy.

No conditions could ever arise which would make it public policy for a great nation to deny the binding force of its own obligations, lawfully issued under a paramount power and validly outstanding. Conditions might arise which would compel an honorable nation to admit, after every possible effort to meet its obligations, that it could not do so. But what conditions could justify an announcement by a sovereign nation that its promise to pay back the equivalent of what it had borrowed was a promise it would not keep and that it would not do what it had agreed to do?

Under our dual system of government no conditions could ever arise which would make it Federal public policy to change the contracts, impair the credit and restrict the borrowing power of the states.

Nor can conditions ever arise which will make it a matter of public policy to impair a whole class of valid private money obligations, by whomsoever owed.

9. All these inconsistencies in the Joint Resolution are due to distorting the scope of the "power to coin money, regulate the value thereof." The true scope of that power is to establish a "suitable medium of exchange" and a "sound and uniform currency," which neither requires nor permits the impairment of a particular class of contracts.

The express power given in Clause 5, Section 8, of Article I is to "coin money, regulate the value *thereof,*" that is, of coined money. Although Congress does have the power to issue paper money as well and to make it legal tender, it does not derive that authority from the coinage power (*Juilliard* v. *Greenman,* 110 U. S. 421, 448). "Regulate" means to "fix" and change from time to time. "Value" means "monetary value," not purchasing power in a particular transaction or power to discharge a particular class of debts. Thus this Court said in *Fox* v. *State of Ohio,* 5 How. 410, at page 433:

> "We think it manifest that the language of the Constitution, by its proper signification, is limited to

> the facts, or to the faculty in Congress of coining and of stamping the standard of value upon what the government creates or shall adopt, and of punishing the offense of producing a false representation of what may have been so created or adopted."

The full scope of the so-called money power was stated in *Veazie Bank* v. *Fenno,* 8 Wall. 533, in which Chief Justice CHASE said that the Congress could "satisfy the wants of the community, in respect of a circulating medium" and "secure a sound and uniform currency" (p. 549).

The power to issue paper money and to make it legal tender is primarily an incident of the borrowing power. This is clear from a reading of this Court's opinions in *Knox* v. *Lee,* 12 Wall. 457, and *Juilliard* v. *Greenman,* 110 U. S. 421. In the latter case Justice GRAY accurately referred to the coinage power as the "analogous power of coining money and regulating the value of domestic and foreign coin" (p. 448).

Congress has undoubted power to do anything reasonably adapted to providing a "sound and uniform currency." But the impairment of the real value of money contracts does not have any tendency whatever to provide such a currency.

The power to "coin money, regulate the value thereof" is a very different thing from a power to regulate money contracts. Money is a medium of exchange, a mere instrument for use in commerce. Money contracts are property created through the use of the medium. The devaluation of the dollar is authorized because Congress has control over the medium itself. One *result* of a devaluation is that it impairs all outstanding contracts made in a fixed number of dollars, simply. But that does not mean that all contracts must be made in a fixed number of dollars, simply; nor does it mean that Congress has the power to eliminate from money contracts any clause providing a standard of value. The scope of the power is over the medium of exchange, not over contracts made in the medium.

10. If the Joint Resolution is sustained, it means, and must mean, that no one, neither the Government itself, states, municipalities, nor private persons, can make a money contract according to any fixed standard of value even if established by law, and lawfully provide therein that the contract shall be performed in the same fixed standard of value in which it was made; it means, and must mean, that Congress has power at all times to impair or destroy at will all money contracts.

This is not only contrary to this Court's decisions in *Bronson* v. *Rodes*, and in the long line of gold clause cases that followed it, but it is inconsistent with the whole idea of any fixed standard at all. It is an appropriate function of government to provide a standard of value as an aid to commerce; for a standard of value is indispensable to business prosperity and to the maintenance of regular and profitable trade and commerce.

In *United States* v. *Marigold*, 9 How. 559, at page 566, this Court, in discussing certain provisions of the Act of March 3, 1825, speaking of the power and duty of Congress with respect to a standard of value, said,

> "They appertain rather to the execution of an important trust invested by the Constitution, and to the obligation to fulfill that trust on the part of the government, namely, the trust and the duty of creating and maintaining a uniform and pure metallic standard of value throughout the Union. The power of coining money and of regulating its value was delegated to Congress by the Constitution for the very purpose, as assigned by the framers of that instrument, of creating and preserving the uniformity and purity of such a standard of value. * * *"

Congress established a fixed metallic standard by the Gold Standard Act of 1900 (see above p. 9). The Railway Company wished to use this standard in its bonds and mortgage. *Knox* v. *Lee* and *Juilliard* v. *Greenman* held

that, if parties made contracts payable in dollars, simply, they would be deemed not to have relied upon the legal standard in existence when the contract was made. Therefore, the Railway Company did not make its contracts payable in money, simply; it expressly agreed to pay back the sum it borrowed measured by the same fixed standard of value established by law as the money it received.

After Congress has established a fixed standard, called it a standard, and by necessary implication told parties to rely upon it, and they have relied upon it by using this lawful fixed standard in their contracts, both in making them and in providing how they shall be performed, can Congress strike out of such contracts the provisions therein which adopt and use for the contracts the standard of value which Congress fixed? If so, the fixed lawful standard was not a standard at all.

Moreover, if the Joint Resolution is valid, it means that Congress can never establish any reliable gold or other fixed standard of value, because, whatever the standard, it is always subject to such retroactive changes as Congress may choose to make.

Thus, by asserting the power to abrogate the gold clause in contracts, Congress in effect asserts that it has no power to establish a fixed standard of value; that there is and can be no such thing as a fixed standard which parties can make the basis of their money contracts; that if Congress by law fixes a standard of value, and parties use that standard in their money contracts, Congress may by legislation change all such contracts and strike out therefrom the provisions thereof relating to the standard of value, whether the contracts were made by the Government itself, by states or municipalities, or by private persons.

Thus, obviously, the object, purpose and effect of this Joint Resolution are not to coin money or regulate the value thereof, nor to do anything which the Constitution au-

thorizes Congress to do. On the contrary, it is a plain, unqualified and direct attempt to violate the obligations of contracts which the Government itself made with authority of Congress in the exercise of its borrowing power, to encroach upon the sovereign power of the states by interfering with their power to borrow money on whatever terms they choose to make, by changing the terms of the contracts which they have made in borrowing money, by impairing their credit, and by interfering with and hindering their future financing, and to take the property of one class of persons and give it to another class without compensation and without due process of law. It is not a case where legislation passed by Congress within its constitutional powers incidentally affects private rights. It is a case where Congress undertakes directly and solely to legislate about contracts, to change their terms and impair their value. We can truly say of this, as this Court said in a similar case, *Osborn* v. *Nicholson,* 13 Wall. 654, 662 (1872),—

> "The proposition, if carried out in this case, would, in effect, take away one man's property and give it to another. And the deprivation would be 'without due process of law.' This is forbidden by the fundamental principles of the social compact, and is beyond the sphere of the legislative authority both of the States and the Nation."

V.

To provide that these bonds can be discharged upon payment of the nominal amount in any kind of dollars, whatever their gold value, is to take the property of one private person and give it to another private person.

1. The obligation of the bonds and mortgage was to pay gold value. The Joint Resolution and the decree below provide that the bonds can be discharged by payment of the nominal amount in any kind of dollars, whatever their gold value. They rewrite the contract, and make it read as if it were to pay dollars, simply.

The result is that *today,* if the Joint Resolution be valid, the bonds and mortgage can be satisfied by payment of a *new* dollar of 15 5/21 grains of gold for every *old* dollar of 25.8 grains agreed to be paid. And, if *tomorrow* the President devalues the dollar again, as he reserved his authority to do (Appendix to Petitioners' Brief, p. 148), or Congress exercises its power to devalue, the mortgage can be discharged by payment of the same number of any kind of dollars, even if their statutory and market value in gold be much less than it is today.

The mortgage was a valid mortgage. It has not been paid. No one has any interest in the property it covers except subject to the terms of the mortgage. To change those terms is to transfer property to some one else. This Court said in *Lynch* v. *United States,* decided June 4, 1933, 292 U. S. 571, 579:

> "Valid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States."

Property is transferred *from* the bondholders. It is transferred *to* the Railway Company, and thus to the holders

of junior liens, the general creditors of the Railway Company, and the stockholders of the Railway Company. The United States of America and Reconstruction Finance Corporation are before the Court in this case as creditors of the Railway Company who wish to benefit from the transfer.

2. The due process clause of the Fifth Amendment prohibits the impairment of the gold clause contracts. In the *Lynch* case the Court said, page 579:

> "As Congress had the power to authorize the Bureau of War Risk Insurance to issue them, the due process clause prohibits the United States from annulling them, unless, indeed, the action taken falls within the federal police power or some other paramount power."

Is any federal power superior to the power to borrow money when the life of the nation is at stake? Is any federal power superior to the borrowing power of states and municipalities for their local purposes? Is any federal power so superior to the security of private property that it can be used directly and solely, not indirectly or incidentally, to impair the value of private property without compensation and without due process of law?

The *Lynch* case not merely condemns this Joint Resolution, but the following quotation from the Court's opinion answers some of the *ad hominem* arguments advanced by our opponents to sustain it (p. 580):

> "Punctilious fulfillment of contractual obligations is essential to the maintenance of the credit of public as well as private debtors. No doubt there was in March, 1933, great need of economy. In the administration of all government business economy had become urgent because of lessened revenues and the heavy obligations to be issued in the hope of relieving widespread distress. Congress was free to reduce gratuities deemed excessive. But Congress was with-

> out power to reduce expenditures by abrogating contractual obligations of the United States. To abrogate contracts, in the attempt to lessen government expenditure, would be not the practice of economy, but an act of repudiation. 'The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen.' (*The Sinking-Fund Cases*, 99 U. S. 700, 719.)"

If Congress has no power to pass laws which violate the obligation of contracts to which the United States is a party, where in the Constitution does it get authority to pass laws the sole purpose of which is directly to violate the obligations of contracts between private individuals? The Fifth Amendment protects the integrity of every contract "whether the obligor be a private individual, a municipality, a state or the United States."

Lynch v. *United States, supra.*

Conclusion.

We have said nothing about Congress having no powers except the powers the people expressly gave it in the Constitution and the powers implied from the powers expressly granted. We have said little or nothing about the reluctance of the people, because of their jealousy for their personal liberty and their apprehensions for the security of their private property, to grant to Congress the limited powers they finally did grant, and then only upon conditions which brought about the prompt adoption of the first ten Amendments. These and other kindred facts, such as the Tenth Amendment, which are fundamental and are at the threshold of every discussion relating to constitutional power, are so familiar to this Court that we do not know

of anything we could say on any one of them that might help a decision of this case.

The security of private property is one of the chief concerns of the Constitution. No person shall be deprived of his property without due process of law, nor shall private property be taken for public use without just compensation. And yet our opponents here ask the Court to sustain the validity of a Resolution of Congress the sole object, purpose and direct effect of which are to deprive persons of their property without due process of law and to take private property for private, not public, use without any compensation. Surely this cannot be done if the Government is a government of limited powers and the language of the Constitution means what it so plainly says.

A Reply to the Brief for the United States and Reconstruction Finance Corporation, separately printed, is filed herewith.

The decree below should be reversed.

Respectfully submitted,

JAMES H. MCINTOSH,
CLIFTON P. WILLIAMSON,
EDWARD W. BOURNE,
THOMAS W. WHITE,
Attorneys for Respondents.

29 December, 1934.